SENATE BILL   No. 1436

Introduced by Senator Murray
(Coauthor: Senator Bowen)
(Coauthors: Assembly Members Chavez and Nation)

February 19, 2004

An act to add Chapter 32 (commencing with Section 22947) to Division 8 of the Business and Professions Code, relating to business.

LEGISLATIVE COUNSEL'S DIGEST

SB 1436, as amended, Murray.   Computer spyware.

Existing law provides for the regulation of various businesses by the Department of Consumer Affairs. No ~~provision of~~ existing law provides for the regulation of computer spyware.

This bill would ~~require~~ *make it unlawful for* a person or entity ~~providing computer software containing~~ *that is not the user of a computer located in California to knowingly install* spyware, as defined, ~~to a~~ *on, or provide computer software containing spyware to, the* computer ~~in California to disclose to the recipient that the software contains spyware and what the spyware does~~ *unless the person has provided a notice meeting specified requirements. The bill would prohibit electronic mail sent from California or to a California e-mail address from containing an HTML link to spyware that automatically downloads, and would prohibit a Web page from automatically downloading spyware onto a user's computer located in California unless notice is provided prior to the download. The bill would also prohibit a person or entity from advertising in spyware distributed or installed in violation of the prohibition.* The bill would*, with specified exceptions,* authorize the recipient of ~~computer~~ spyware transmitted in

violation of ~~the~~ *these* prohibitions~~,~~ *or* the Internet service provider~~, or the Attorney General~~ to bring an action to recover actual damages~~. The bill~~*, and* would authorize these parties to recover liquidated damages of $1,000 per transmission, subject to reduction by a court for specified reasons. The bill would provide for an award of reasonable attorney's fees and costs to a prevailing plaintiff.

~~This bill would prohibit the transmission to a computer in California of software containing spyware in violation of the policy of the recipient's Internet service provider. The bill would authorize a provider whose policy is violated to bring a civil action to recover specified damages. The bill would prohibit a provider from bringing an action under both this provision and other provisions being added by the bill for the same transmission of software containing spyware.~~

This bill would provide that if any part of these provisions or their applications are held invalid, the invalidity would not affect other provisions.

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~ *no*. State-mandated local program: no.

The people of the State of California do enact as follows:

1 ~~SECTION 1.   Chapter 32 (commencing with Section 22947)~~
2 *SECTION 1.   Chapter 32 (commencing with Section 22947) is*
3 *added to Division 8 of the Business and Professions Code, to read:*
4
5 CHAPTER 32.   CONSUMER PROTECTION AGAINST COMPUTER
6 SPYWARE ACT
7
8 *22947.   This chapter shall be known as and may be cited as the*
9 *Consumer Protection Against Computer Spyware Act.*
10 *22947.1.   For purposes of this chapter, the following terms*
11 *have the following meanings:*
12 *(a) "Cookie" means a text file that is placed on a computer by*
13 *an Internet service provider, interactive computer service, or*
14 *Internet Web site, and that has the sole function of recording*
15 *information that can be read or recognized by an Internet service*
16 *provider, interactive computer service, or Internet Web site when*
17 *the user of the computer uses or accesses the Internet service*
18 *provider, interactive computer service, or Internet Web site. A*

cookie does not track or report to a third party the Web sites that
a user visits.
(b) "Install" means either of the following actions:
(1) Writing computer software to a computer's persistent
storage medium, such as the computer's hard disk, in such a way
that the computer software is retained on the computer after the
computer is turned off and subsequently restarted.
(2) Writing computer software to a computer's temporary
memory, such as random access memory, in such a way that the
software is retained and continues to operate after the user of the
computer turns off or exits the Internet service, interactive
computer service, or Internet Web site from which the computer
software was obtained.
(c) "Personal information" means any of the following:
(1) Name.
(2) Credit card numbers.
(3) Passwords.
(4) Account balances.
(5) Overdraft history.
(6) Credit or debit card information.
(7) Payment history.
(8) An individually identifiable history of Web sites visited.
(9) A social security number.
(10) A personal identification number (PIN).
(11) A telephone number.
(12) An electronic mail address.
(13) An online user name.
(14) A home address.
(15) A work address.
(16) A record of a purchase or purchases.
(17) An electronic mail, whether sent or received.
(d) "Settings modification feature" means a function of
computer software that, when installed on a computer, does either
of the following:
(1) Modifies an existing user setting, without direction from the
user of the computer, with respect to another computer software
application previously installed on that computer.
(2) Enables a user setting with respect to another computer
software application previously installed on that computer to be

1 *modified in the future without advance notification to, and consent*
2 *from, the user of the computer.*
3 *(e) "Spyware" means an executable computer software*
4 *program that is installed on a user's computer without the*
5 *knowledge of a computer user by a computer software*
6 *manufacturer, computer software controller, or Web site operator,*
7 *and that does either of the following:*
8 *(1) Gathers and transmits to the provider of the computer*
9 *software, to a third party, or to a remote computer or server any*
10 *of the following types of information:*
11 *(A) The personal information of a user.*
12 *(B) Data regarding computer usage, including, but not limited*
13 *to, which Internet sites are or have been visited by a user.*
14 *(2) Operates in a manner that is intended to confuse or mislead*
15 *the user concerning the identity of the person or entity responsible*
16 *for the performed functions or content displayed by the computer*
17 *software.*
18 *(3) Contains a settings modification feature.*
19 *(4) Causes advertisements to be displayed from a file located*
20 *on the user's hard disk drive.*
21 *(f) "User" means either of the following:*
22 *(1) A computer owner.*
23 *(2) An individual who operates a computer with the*
24 *authorization of the computer's lawful owner.*
25 *22947.2. (a) It is unlawful for a person or entity that is not the*
26 *user of a computer to knowingly install spyware on, or provide*
27 *computer software containing spyware to the user of, a computer*
28 *located in California unless the notice requirements of this section*
29 *are complied with.*
30 *(b) A person or entity that provides computer software*
31 *containing spyware to a user's computer in California, or causes*
32 *spyware to be placed on, or downloaded onto, a user's computer*
33 *located in California shall disclose, in a clear notice of at least*
34 *18-point font, all of the following information to the user who is*
35 *the recipient of the spyware:*
36 *(1) That the computer software contains spyware.*
37 *(2) What the functions of the spyware are.*
38 *(3) What specific personal information the spyware collects.*
39 *(4) How the personal information is collected.*
40 *(5) To whom any collected personal information is sent.*

1　*(6) What types of advertisements the spyware will cause the*
2　*user to view.*
3　*(7) A valid electronic mail address or toll free telephone*
4　*number for the person or entity.*
5　*(8) The purpose for which the collected personal information*
6　*will be used.*
7　*(9) In the case of a settings modification feature, both of the*
8　*following:*
9　*(A) A clear description of the nature of the modification, its*
10　*function, and any collateral effects that the modification may*
11　*produce.*
12　*(B) A clear description of procedures the user may follow to*
13　*turn off the feature or uninstall the computer software.*
14　*(c) The notice required by this section shall be displayed to the*
15　*user prior to the occurrence of any of the following:*
16　*(1) The computer software's opening download.*
17　*(2) A Web site placing the spyware on a user's computer.*
18　*(3) The computer software's installation.*
19　*(d) Placing the required notice in a license agreement does not*
20　*satisfy the requirements of this section.*
21　*(e) Electronic mail sent from California or to a California*
22　*e-mail address may not contain an HTML link to spyware that*
23　*automatically downloads onto a user's computer when a viewer*
24　*opens the e-mail or the link, unless a notice meeting the*
25　*requirements of this section is provided prior to the download.*
26　*(f) A Web page may not automatically, upon opening the page,*
27　*download spyware onto a user's computer located in California*
28　*unless a notice meeting the requirements of this section has been*
29　*provided prior to the download.*
30　*(g) A person or entity may not advertise in spyware distributed*
31　*in violation of this section.*
32　*22947.3. (a) Notwithstanding any other provisions of this*
33　*chapter, the following do not constitute spyware and are not*
34　*subject to the requirements of this chapter:*
35　*(1) Paid advertisements and pop-ups that are part of a Web site*
36　*as long as these paid advertisements do not place files or data on*
37　*a user's hard disk drive without proper notice.*
38　*(2) Computer software or data that reports to an Internet Web*
39　*site only information previously stored by that Internet Web site on*

1 *the user's computer. This includes, but is not limited to, the*
2 *following:*
3 *(A) Cookies.*
4 *(B) HTML code.*
5 *(C) Java-like scripts.*
6 *(b) For purposes of this chapter, a person shall not be deemed*
7 *to have installed spyware on a computer solely because that person*
8 *did either of the following:*
9 *(1) Provided the Internet connection or other transmission*
10 *capability through which the computer software was delivered to*
11 *the computer for installation.*
12 *(2) Provided the storage or hosting, at the direction of another*
13 *person and without selecting the content to be stored or hosted, of*
14 *the computer software or of an Internet Web site through which the*
15 *computer software was made available for installation.*
16 *22947.4. (a) (1) In addition to any other remedies provided*
17 *by this chapter or any other provision of law, a person who has*
18 *spyware installed or receives computer software containing*
19 *spyware in violation of Section 22947.2 or the Internet service*
20 *provider may bring an action against the person or entity that*
21 *violated Section 22947.2 to recover either or both of the following:*
22 *(A) Actual damages.*
23 *(B) Liquidated damages of one thousand dollars ($1,000) for*
24 *each instance of spyware installed, or computer software*
25 *containing spyware provided, in violation of Section 22947.2.*
26 *(2) The recipient or the Internet service provider, if the*
27 *prevailing plaintiff, may also recover reasonable attorney's fees*
28 *and costs.*
29 *(b) If the court finds that a defendant established and*
30 *implemented, with due care, practices and procedures reasonably*
31 *designed to effectively provide the notice required by Section*
32 *22947.2, the court shall reduce the liquidated damages*
33 *recoverable under subdivision (a) to a maximum of one hundred*
34 *dollars ($100) for each instance of spyware installed, or computer*
35 *software containing spyware provided, in violation of this chapter.*
36 *(c) There shall not be a cause of action under this section*
37 *against an Internet service provider that is only involved in the*
38 *routine transmission over its computer network of the computer*
39 *software containing spyware.*

1   *22947.9.   The provisions of this chapter are severable. If any*
2 *provision of this chapter or its application is held invalid, that*
3 *invalidity shall not affect any other provision or application that*
4 *can be given effect without the invalid provision or application.*
5 ~~is added to Division 8 of the Business and Professions Code, to~~
6 ~~read:~~
7
8   ~~CHAPTER 32.   CONSUMER PROTECTION AGAINST COMPUTER~~
9   ~~SPYWARE ACT~~
10
11   ~~22947.   This chapter shall be known as and may be cited as the~~
12 ~~Consumer Protection Against Computer Spyware Act.~~
13   ~~22947.1.   For purposes of this chapter, "spyware" means an~~
14 ~~executable program that automatically and without the control of~~
15 ~~a computer user gathers and transmits to the provider of the~~
16 ~~program or to a third party either of the following types of~~
17 ~~information:~~
18   ~~(a) Personal information or data of a user.~~
19   ~~(b) Data regarding computer usage, including, but not limited~~
20 ~~to, which Internet sites are or have been visited by a user.~~
21   ~~22947.2.   (a) A person or entity that provides computer~~
22 ~~software containing spyware to a computer in California shall~~
23 ~~disclose the following information to the recipient of the software:~~
24   ~~(1) That the software contains spyware.~~
25   ~~(2) What the spyware does.~~
26   ~~(b) The statement required by subdivision (a) shall be in at least~~
27 ~~18-point type and shall be included in the first appearing of the~~
28 ~~following:~~
29   ~~(1) The software's opening download.~~
30   ~~(2) The Web site of the provider or of the software.~~
31   ~~(3) The initial installation screen for the software.~~
32   ~~22947.3.   (a) (1) In addition to any other remedies provided~~
33 ~~by this chapter or by any other provision of law, a person who~~
34 ~~receives computer software containing spyware in violation of~~
35 ~~Section 22947.2, an Internet service provider, or the Attorney~~
36 ~~General may bring an action against the violator to recover either~~
37 ~~or both of the following:~~
38   ~~(A) Actual damages.~~

1   (B) Liquidated damages of one thousand dollars ($1,000) for
2 each instance of software containing spyware provided in
3 violation of Section 22947.2.
4   (2) The recipient, an Internet service provider, or the Attorney
5 General, if the prevailing plaintiff, may also recover reasonable
6 attorney's fees and costs.
7   (3) There shall not be a cause of action against an Internet
8 service provider that is only involved in the routine transmission
9 of the software containing spyware over its computer network.
10   (b) If the court finds that the defendant established and
11 implemented, with due care, practices and procedures reasonably
12 designed to effectively distribute the statement required by
13 Section 22947.2, the court shall reduce the liquidated damages
14 recoverable under subdivision (a) to a maximum of one hundred
15 dollars ($100) for each provision of software containing spyware.
16   22947.4.   (a) A person or entity may not transmit computer
17 software containing spyware to a computer in California in
18 violation of the policy of the recipient's Internet service provider.
19   (b) (1) In addition to any other action available under law, an
20 Internet service provider whose policy on computer spyware
21 transmission is violated may bring a civil action to recover the
22 actual monetary loss suffered by that provider by reason of that
23 violation, or liquidated damages of fifty dollars ($50) for each
24 transmission of software containing spyware in violation of this
25 section, up to a maximum of twenty-five thousand dollars
26 ($25,000) per day, whichever amount is greater.
27   (2) In any action brought pursuant to paragraph (1), the court
28 may award reasonable attorney's fees to a prevailing party.
29   (3) In any action brought pursuant to paragraph (1), the Internet
30 service provider shall be required to establish as an element of its
31 cause of action that, prior to the alleged violation, the defendant
32 had actual notice of both of the following:
33   (A) The Internet service provider's policy on the transmission
34 of software containing spyware.
35   (B) The fact that the defendant's transmission of software
36 containing spyware would use or cause to be used the Internet
37 service provider's equipment.
38   (4) (A) An Internet service provider who has brought an action
39 against a party under Section 22947.3 may not bring an action

1 ~~against that party under this section for the same transmission of~~
2 ~~software containing spyware.~~
3 ~~(B) An Internet service provider who has brought an action~~
4 ~~against a party for a violation of this section may not bring an~~
5 ~~action against that party under Section 22947.3 for the same~~
6 ~~transmission of software containing spyware.~~
7 ~~22947.9.   The provisions of this chapter are severable. If any~~
8 ~~provision of this chapter or its application is held invalid, that~~
9 ~~invalidity shall not affect any other provision or application that~~
10 ~~can be given effect without the invalid provision or application.~~

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